COURT OF APPEALS OF WISCONSIN
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2019AP1565 CR

RYAN HUGH MULHERN,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

Appeal from the circuit court for Pierce County, Judge Joseph Boles.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether Mr. Mulhern is entitled to a new trial because the trial court erroneously allowed the alleged victim to testify in violation of the "rape shield" law.

The trial court did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will fully present and discuss the issue on appeal.

The opinion in this case should not be published because it does not meet any of the criteria for publication under Rule 809.23 (1)(a).

STATEMENT OF THE CASE

Statement of Facts

The appellant, Ryan Mulhern, was charged in a complaint with second degree sexual assault, strangulation and misdemeanor bail jumping, all as a result of an incident that occurred in the early morning hours of November 23, 2016. R.1. He appeared for a trial on those counts on March 7, 2018, at which one of the first things discussed were the State's motions *in limine* (filed the day before), one of which asked the court to prohibit the defense from eliciting testimony from any witness or present any argument regarding the past sexual history between Mulhern and the alleged victim, "Peg[1]." A.Ap., A101; R.17. After hearing the comments of counsel, the court stated that it wanted to take another look at the "rape shield" law and would make a decision later. R.85:20-21.

During Peg's direct testimony, she told the jury that she had showered after the alleged sexual assault (R.85:149) and under cross-examination she testified that she had not used soap when she showered and that she had not given the clothes she had been wearing during the assault to the police (for analysis, presumably) because they did not ask for them. R.85:154, 176.

On the second day of trial, when the DNA analyst from the crime lab testified, he told the jury that the only DNA from Mulhern that was found on Peg was on her neck. R.86:189. On cross-examination, he testified that no semen was found in her vagina, despite her previous testimony that Mulhern had engaged in intercourse with her, without a condom, for around five minutes.

[1] The alleged victim is referred to by the pseudonym "Peg" pursuant to Rule 809.86(4), which prohibits a party from identifying a victim by any part of his or her name.

R.86:196. After two more witnesses testified, the State asked to re-call Peg to the stand, to which defense counsel objected initially because he believed she could only be re-called in rebuttal. R.86:261-62.

After the court determined that the State could re-call her, defense counsel argued that it was unfair to do so without explaining what questions were to be asked, which the prosecutor was happy to do, as he had just two, the second of which was "... did you have sexual intercourse or sexual contact with anyone for one week prior to November 22nd, 2016?" R.86:264. Defense counsel argued that the prosecutor could not ask the second question "... under the rape shield law. He hasn't filed a motion, he hasn't brought that up. I can't ask for those questions, he can't, either, number one." *Id.*

After hearing from the prosecutor, the court stated that the problem had with the second question was "... under 972.11, any conduct or behavior relating to sexual activities of complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and lifestyle is not admissible, and so I think that applies to both sides. I don't see – I don't see how we can do that." A.Ap., A102-4; R.86:264-66. The prosecutor then argued that his understanding of the rape shield law was that it dealt with "... prior sexual acts. I mean, this is abstinence, it's the lack of sexual history. I mean, it's not – " A.Ap., A105; R.86:267. Defense counsel argued that it was "... sexual history, whether it's lack or not, after which the court stated:

> Sexual conduct means – this is what's prohibited: any conduct or behavior relating to sexual activities of complaining witness,

> including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and lifestyle, etc. And so I – I think [the prosecutor]'s correct on that, that it is conduct not lack of conduct, so I'm going to permit that, that testimony, as well.
>
> *Id.*

Following a discussion about the testimony of another witness, defense counsel asked the court to clarify its decision and the court stated: "If she – she can testify – I mean, if she didn't have any – it's the lack of sexual activity. It's not sexual conduct, it's the lack of it, and I think that is permissible, and that's what my ruling is because it's not testimony that's within the definition of sexual conduct under 972.11, it's the lack of it, so – " A.Ap., A106; R.86:268. When Peg returned to the stand a few minutes later, she testified that she had not had sexual intercourse or sexual contact with anyone during the week prior to the alleged sexual assault. R.86:275.

During closing arguments, the prosecutor referred to the DNA analyst's testimony that DNA clears the vagina in five days, then went on to say that Peg had testified that she had had no sex in the week before the alleged assault "So the sex assault was November 22nd, it's the same date as the evidence collection, and there was male DNA found in the vagina. Given this information, I submit to you one reasonable hypothesis, given this information, this timeline, is that the male DNA is the Defendant." R.86:364. After more than four hours of deliberation, the jury found the appellant guilty of sexual assault, but not guilty of strangulation. R.86:384.

Mr. Mulhern now appeals the judgment of conviction (R.68) on the grounds that the trial court erred, as a matter of law, when it permitted the testimony of the alleged victim in violation of the

rape shield law.

Procedural History

This is an appeal from the judgment of conviction, entered October 26, 2018 in the circuit court for Pierce County, Joseph Boles, Judge. R.68. Following the filing of the Notice of Intent to Pursue Post Conviction Relief and the appointment of postconviction counsel, a Notice of Appeal was filed in the trial court on August 19, 2019. R.76. The record in the appeal was filed on September 25, 2019.

ARGUMENT

I. MR. MULHERN IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE IN VIOLATION OF THE RAPE SHIELD LAW THAT PREJUDICED HIM.

Standard of Review

"When it is clear that error has been committed, we should be sure that the error did not work an injustice. The only reasonable test to assure this result is to hold that, where error is present, the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be *de minimus*." *State v. Dyess*, 124 Wis.2d 525, 619-20, 370 N.W.2d 222 (1985).

A. The Trial Court Erroneously Admitted Evidence in Violation of the Rape Shield Law.

The trial court allowed Peg to testify that she had not had sex with anyone else in the week prior to the alleged sexual assault by Mulhern. Her testimony clearly violated the rape shield law, as was noted in a supreme court case within the last year, which stated that:

> ... Wis. Stat. § 972.11(2)(b) (the "Rape Shield" statute), ... precludes admission of "any evidence" of the complainant's "prior sexual conduct." Prior sexual conduct includes a lack of sexual conduct, meaning that evidence that a complainant had never had sexual intercourse is inadmissible. *State v. Gavigan*, 111 Wis. 2d 150, 159, 330 N.W.2d 571 (1983). This prohibition extends to indirect references to a complainant's lack of sexual experience or activity. *Id.* Evidence of this nature is prohibited because it "is generally prejudicial and bears no logical correlation to the complainant's credibility." *Id.* at 156, 330 N.W.2d 571.
>
> *State v. Bell*, 2018 WI 28, ¶63, 909 N.W.2d 750, 380 Wis.2d 616.

Because prior sexual conduct includes the lack of sexual conduct, Peg's testimony violated the rape shield statute, it was erroneously

admitted and influenced the jury's verdict.

B. The Erroneously Admitted Evidence Prejudiced Mulhern.

The supreme court long ago held that when there is an error at trial

> ... the test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. *Billings*, 110 Wis.2d at 667, 329 N.W.2d 192. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.
>
> *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

This was a case in which the police investigation was lacking in almost every respect. They failed to obtain the bed's sheets and Peg's clothing in order to analyze them for DNA. Mr. Mulhern's DNA was not found in Peg's vagina, leaving the most logical source another individual. Without her erroneously allowed testimony about not having had sex with anyone else that week, there is every reason to believe that the jury would have reached a different verdict on the sexual assault charge. There is more than a reasonable probability that this error contributed to Mulhern's conviction.

Without her improper testimony, the State's case rested almost entirely on her earlier direct testimony that the assault took place (and her claims to others that it had happened), which Mulhern completely denied when he later took the stand to testify. The State cannot meet its burden of showing that there is no reasonable probability that this error contributed to

the conviction. For this reason, Mr. Mulhern is entitled to a new trial.

CONCLUSION

For the foregoing reasons Mr. Mulhern respectfully submits that he is entitled to a new trial.

RESPECTFULLY SUBMITTED this 4th day of November, 2019.

Schertz Law Office
Attorneys for the Appellant

By: _____
Dennis S. Schertz

APPENDIX

CERTIFICATION REGARDING APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION REGARDING BRIEF LENGTH

I certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c), Stats., for a brief produced using the following font:

☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,576 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 4, 2019

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